

**'Government consultation on same sex marriage'**

I attach for information a copy of the submission that the Archbishops sent to the Home Secretary on 11 June in response to the Government's consultation document following discussion at the Archbishops' Council and House of Bishops.

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**June 2012**

Secretary General

## GENERAL SYNOD

### A RESPONSE TO THE GOVERNMENT EQUALITIES OFFICE CONSULTATION -“EQUAL CIVIL MARRIAGE”- *FROM THE CHURCH OF ENGLAND*

#### Summary

The Church of England cannot support the proposal to enable “all couples, regardless of their gender, to have a civil marriage ceremony”.

Such a move would alter the intrinsic nature of marriage as the union of a man and a woman, as enshrined in human institutions throughout history. Marriage benefits society in many ways, not only by promoting mutuality and fidelity, but also by acknowledging an underlying biological complementarity which, for many, includes the possibility of procreation.

We have supported various legal changes in recent years to remove unjustified discrimination and create greater legal rights for same sex couples and we welcome that fact that previous legal and material inequities between heterosexual and same-sex partnerships have now been satisfactorily addressed. To change the nature of marriage for everyone will be divisive and deliver no obvious legal gains given the rights already conferred by civil partnerships. We also believe that imposing for essentially ideological reasons a new meaning on a term as familiar and fundamental as marriage would be deeply unwise.

The consultation paper wrongly implies that there are two categories of marriage, “civil” and “religious”. This is to mistake the wedding ceremony for the institution of marriage. The assertion that “religious marriage” will be unaffected by the proposals is therefore untrue, since fundamentally changing the state’s understanding of marriage means that the nature of marriages solemnized in churches and other places of worship would also be changed.

To remove the concept of gender from marriage while leaving it in place for civil partnerships is unlikely to prove legally sustainable. It is unlikely to prove politically sustainable to prevent same sex weddings in places of worship given that civil partnerships can already be registered there where the relevant religious authority consents. And there have to be serious doubts whether the proffered legal protection for churches and faiths from discrimination claims would prove durable. For each of these reasons we believe, therefore, this consultation exercise to be flawed, conceptually and legally.

Our arguments are set out in greater detail below.

## **The Church's understanding of marriage**

1. In common with almost all other Churches, the Church of England holds, as a matter of doctrine and derived from the teaching of Christ himself, that marriage in general – and not just the marriage of Christians – is, in its nature, a lifelong union of one man with one woman.
2. The Church of England's understanding of marriage as a lifelong union between one man and one woman is derived from the Scriptures and enshrined within its authorised liturgy. According to the Common Worship marriage service (derived from the Book of Common Prayer of 1662):

*"The Bible teaches us that marriage is a gift of God in creation and a means of his grace, a holy mystery in which man and woman become one flesh. It is God's purpose that as husband and wife give themselves to each other in love throughout their lives, they shall be united in that love as Christ is united with his Church.*

*Marriage is given that husband and wife may comfort and help each other, living faithfully together in need and in plenty, in sorrow and in joy. It is given that with delight and tenderness they may know each other in love and through the joy of their bodily union may strengthen the union of their hearts and lives. It is given as the foundation of family life in which children may be born and nurtured in accordance with God's will, to his praise and glory.*

*In marriage husband and wife belong to one another and they begin a new life together in the community. It is a way of life that all should honour and it must not be undertaken carelessly, lightly or selfishly but reverently, responsibly and after serious thought."*

(Paragraphs 2, 3 and 4 of the Alternative Preface to the Marriage Service in *Common Worship: Pastoral Services*, p. 136).

3. This same understanding of marriage is reflected in the vows taken by husband and wife:

*"The Church of Christ understands marriage to be, in the will of God, the union of a man and a woman, for better, for worse, for richer for poorer, in sickness and in health, to love and to cherish, till parted by death."*

(*Common Worship: Pastoral Services*, page 177)

## **The Church's position on same-sex marriage**

4. **Question 1** of the consultation asks: *Do you agree or disagree with enabling all couples, regardless of their gender, to have a civil marriage ceremony?* We disagree with this proposition for the following reasons which are not only based on the tenets of the Christian faith (and, in particular, the Church of England), but which are also drawn from our commitment, as the established church in England, to the common good of all in society.

5. It is well known that there is a continuing debate within the Church of England about its declared view of sexually active homosexual relationships. It is important to understand that our response to the question of same-sex marriage does not prejudge the outcome of that continuing theological and ethical debate. Our concern is for the way the meaning of marriage will change for everyone, gay or straight, if the proposals are enacted. Because we believe that the inherited understanding of marriage contributes a vast amount to the common good, our defence of that understanding is motivated by a concern for the good of all in society.
6. We disagree with the proposition on the following grounds:
  - the intrinsic nature of marriage, as enshrined in human institutions since before the advent of either church or state, is the union of a man and a woman.
  - marriage affords many benefits to society, which include mutuality, fidelity and biological complementarity with the possibility of procreation.
  - marriage is a central and unique social institution, not to be confused with the particular ceremony through which it is entered into.

These points are explained in detail below. We deal first with the arguments concerning the nature of marriage. In an Annex we outline the legal arguments relevant to the consultation.

#### *Marriage within a flourishing society*

7. Throughout history, in the laws of the land and in the Church of England's Book of Common Prayer on which the laws concerning marriage are grounded, marriage has been understood to be, always and exclusively, between a woman and a man. This understanding is deeply rooted in our social culture. While marriage has evolved as an institution in many other ways this aspect has remained constant. For the consultation document to talk of a "ban" on same sex couples marrying is a misuse of the language. There can be no "ban" on something which has never, by definition, been possible.
8. Many, within the churches and beyond, dispute the right of any government to redefine an ages-old social institution in the way proposed. It is important to be clear that insistence on the traditional understanding of marriage is not a case of knee-jerk resistance to change but is based on a conviction that the consequences of change will not be beneficial for society as a whole.
9. Despite the continuing debate in the Church of England on some key ethical issues in this area, the proposition that same-sex relationships can embody crucial social virtues is not in dispute. To that extent, the Prime Minister's claim that he supports same-sex marriage from conservative principles is readily understandable. Same-sex relationships often embody genuine mutuality and fidelity, two of the virtues which the Book of Common Prayer uses to commend marriage. The Church of England seeks to see those virtues maximised in society.
10. However, the uniqueness of marriage – and a further aspect of its virtuous nature – is that it embodies the underlying, objective, distinctiveness of men and women. This distinctiveness and complementarity are seen most explicitly in the biological union of man and woman

which potentially brings to the relationship the fruitfulness of procreation. And, even where, for reasons of age, biology or simply choice, a marriage does not have issue, the distinctiveness of male and female is part of what gives marriage its unique social meaning.

11. Marriage has from the beginning of history been the way in which societies have worked out and handled issues of sexual difference. To remove from the definition of marriage this essential complementarity is to lose any social institution in which sexual difference is explicitly acknowledged.
12. To argue that this is of no social value is to assert that men and women are simply interchangeable individuals. It also undermines many of the arguments which support the deeper involvement of women in all social institutions on the grounds that a society cannot flourish without the specific and distinctive contributions of each gender.
13. **We believe that redefining marriage to include same-sex relationships will entail a dilution in the meaning of marriage for everyone by excluding the fundamental complementarity of men and women from the social and legal definition of marriage.**
14. This might in itself seem a somewhat theoretical argument if such a redefinition were necessary to remedy an injustice which could not be addressed in some other way. Civil partnerships have, however, already provided a framework within which same sex couples can exhibit the social virtues of fidelity and mutuality.
15. In addition it is not clear what additional new rights, opportunities or responsibilities if any the introduction of same-sex marriage would achieve given that the legal inequalities between heterosexual married couples and same-sex partners have already been addressed through the introduction of civil partnerships – which was supported by the majority of our bishops who voted on the legislation in 2004 when it was before the House of Lords.
16. The one justification for redefining marriage given to us by the Equalities Minister was that it “met an emotional need” among some within the LGBT community. Without wishing to diminish the importance of emotional needs, legislating to change the definition of a fundamental and historic social institution for everybody in order to meet the emotional need of some members of one part of the community, where no substantive inequality of rights will be rectified, seems a doubtful use of the law. We also note that by no means all LGBT people are in favour of redefining marriage in this way.

*“Religious” and “Civil” Marriage*

17. **The consultation document draws a distinction between “religious” and “civil” marriage in a way which assumes that such a distinction is a matter of fact. There is no such distinction in law. This use of language is therefore disingenuous and tends to obscure the fact that changing the law to embrace same-sex marriages, on the terms set out in the consultation, would necessitate introducing such a distinction for the first time – something which the consultation goes on to say (at paragraph 2.7) that it does not intend to do.**

18. In law, there is one social institution called marriage, which can be entered into through either a religious or a civil ceremony. To suggest that this involves two kinds of marriage is to make the category error of mistaking the ceremony for the institution itself. In the Annex to this response we set out further legal analysis of the consultation is in fact proposing and the legal consequences that that would have.

*Major unresolved questions*

19. We note that in paragraphs 2.14—2.16, the consultation document leaves the complex question of defining adultery, non-consummation etc. to be determined by case law. The stated objective of having identical reasons for ending both a same-sex and a heterosexual marriage is problematic and does not seem to be achievable given that the existing definitions of adultery and non-consummation cannot be applied to the case of a same-sex marriage. The proposed reliance on case law to sort out these points is unsatisfactory. More fundamentally the analysis fails to take account of the fact that consummation has always been an integral part of the common understanding of marriage between church and state, with annulment possible where consummation does not occur.
20. Questions 6 and 8 refer to the proposal to retain the category of civil partnerships solely for same-sex couples, following the introduction of same-sex marriage. No rationale is given. In the absence of a clear rationale it is unlikely that the provisions of a bill that gave effect to this aspect of the proposal would survive the Parliamentary legislative process.
21. Even if they did, it must be very doubtful whether they could withstand a human rights law challenge. Whereas the European Court of Human Rights has upheld the right of states to retain marriage as the union between a man and a woman it seems extremely doubtful that it would uphold the right of a state to retain gender inequality in civil partnerships once the state had legislated for ‘equal marriage’. We say more about this in the Annex to this paper and should be interested to see the Government’s legal analysis of this issue.
22. Given that Parliament has already legislated to enable civil partnerships to be registered in religious premises where the relevant religious authority has so agreed (paras. 24 and 25), some rationale is needed for the current proposal to preclude same-sex marriages from being solemnised in religious premises on exactly the same terms. This appears to be a consequence of the fallacious assumption that “religious” and “civil” marriages are distinct. We do not believe that the current proposal would in fact prove tenable.
23. These confusions have arisen because the proposals are, in fact, of much deeper social significance than has been acknowledged. By attempting to chart a line of least resistance the Government has ended up with recommendations which, whatever view is taken of the underlying principles, are lacking in coherence.
24. The Church of England’s unique place in the current marriage law of England means that the proposals will potentially have a very significant impact on our ability to serve the people of the nation as we have always done.

## The Consultation Exercise

25. The terms of the consultation exercise have been unsatisfactory in that, in at least three instances, the consultation document prejudices the outcome:
- **The document expresses the issues in prejudicial terms which pre-empt the principles on which it purports to consult.** For example, (para. 1.1, cp. para. 2.1) “the consultation is about how the ban can be lifted on same sex couples having a marriage through a civil ceremony”. The language of a “ban” has been promoted by certain pressure groups and it is disappointing to see the GEO adopt this polemical language uncritically. To speak of a “ban” implies an act of human will to prevent same sex couples marrying and therefore excludes the alternative view that heterosexual marriage is an ages-old social institution which, by definition, can only be entered into by a man and a woman. Serious and widely-held views are therefore rejected in advance by the way the “problem” is defined.
  - **By asserting the existence of a non-existent concept, the consultation wrongly assumes that changes that would be required by the proposal are already matters of fact.** Para. 1.7 (*et seq.*) introduces the concept of “religious marriage” as if it were an established fact. From the earliest discussions with Ministers on this subject we have pointed out that there is no distinction in law between “religious” and “civil” marriage.
  - **Contentious views, on which the consultation should be seeking respondents’ opinions, are asserted as undisputed facts.** For example (para. 1.9i) “The Government recognises that the commitment made between a man and a man, or a woman and a woman in a civil partnership is as significant as the commitment between a man and a woman in a civil marriage”. However, if one of the significant elements of the commitment that a man and a woman generally make to each other in marriage is to be open to bringing children into the world as a fruit of their loving commitment, then the commitment of same-sex couples (whatever its virtues) cannot be acknowledged as identical. But this viewpoint is effectively excluded by the wording of the consultation document.
26. On 15 March 2012 (just as the consultation was being launched) the Equalities Minister, Lynne Featherstone, was quoted in the *Daily Telegraph* as giving a “cast iron guarantee” that gay civil marriages would be law by the next general election, and that “The essential question is not whether we are going to introduce same-sex civil marriage but how.” **Given that the first question on the consultation document is, “Do you agree or disagree with enabling all couples, regardless of gender, to have a civil marriage ceremony”, the Minister’s comments imply that the question is redundant.** This is not the right way for addressing a subject of this significance.

## Annex

### Marriage law: the position of the Church of England

1. The Church of England has a unique position in relation to the solemnization of marriages in English law. There are therefore particular issues of concern about the impact of the Government's proposals on the Church, notwithstanding statements in the consultation paper that 'religious marriage' would be unaffected by the proposals.
2. England is divided geographically into ecclesiastical parishes so that everyone who lives in England resides in a parish.<sup>1</sup> At common law, parishioners – that is all those who are resident in a parish whether they are members of the Church of England or not – have certain legal rights in relation to the parish church and the ministry of the parochial clergy. Those rights include the right to marry in the parish church and to have the marriage solemnized by the minister of the parish.
3. Anyone who is resident in England has a legal right to marry in his or her parish church irrespective of his or her religious affiliation and the minister of the parish (the rector, vicar or priest in charge) is under a legal duty to conduct the marriage.<sup>2</sup> The existence of this right is recognised by the Marriage Act 1949 (which governs the procedure for all marriages in England and Wales).
4. Additional rights have been created by statute. A person also has a legal right to marry in a parish church which is his or her usual place of worship, which means having his or her name entered on the church electoral roll of the parish in question.<sup>3</sup> A person also has a legal right to marry in the parish church of a parish with which he or she has a 'qualifying connection'.<sup>4</sup>
5. 'Qualifying connections' include having been baptized or confirmed in the parish, having previously lived in the parish for at least six months, having a parent who has lived in the parish for at least six months or having a parent or grand parent who was married in the parish.
6. Owing to the position of the Church of England as the established church in England, all of its clergy are automatically legally authorised to solemnize marriages and they are therefore subject to certain legal duties and responsibilities in relation to marriage simply by virtue of being ordained ministers of the Church. By contrast, ministers of other denominations and religions are able to solemnize marriages only if they are individually appointed as 'authorised persons', and civil registrars are specifically appointed by the local authority as registrars of marriages.
7. The Church of England is also responsible for the legal preliminaries to marriages that take place in its churches. The parochial clergy are under a legal duty to publish banns of marriage and have other responsibilities in connection with that. And various ecclesiastical authorities have legal functions in connection with the granting of marriage licences (i.e. 'common licences' granted by ecclesiastical judges, and the Archbishop of Canterbury's 'special licence').

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<sup>1</sup> This is subject to certain exceptions that are not material for present purposes: e.g. certain Royal residences, cathedral precincts and some other places are extra-parochial.

<sup>2</sup> The exercise of this right is subject to statutory provisions which allow individual clergy to decline to solemnize marriages where a party is divorced and has a living former spouse, or is of the acquired gender under the Gender Recognition Act 2004, or where the parties are within certain degrees of kindred and affinity within which it is now lawful for persons to marry.

<sup>3</sup> Sections 6(4) and 72, Marriage Act 1949.

<sup>4</sup> Section 1, Church of England Marriage Measure 2008.

8. Again, this means that the Church of England is in a distinctive position compared with other denominations and religious bodies. Marriages that take place in their registered buildings are solemnized following civil preliminaries which are the responsibility of the local authority.
9. Around a quarter of marriages solemnized in England are solemnized by the clergy of the Church of England in accordance with the various common law and statutory rights mentioned above.

### **The proposals would change the legal definition of marriage in all cases**

10. The main body of the response points out that there is no distinction in law between ‘religious’ and ‘civil’ marriage (paragraphs 17 and 18) and that the Government’s proposals would involve “a dilution in the meaning of marriage for everyone” (paragraph 13). Here we provide a more detailed legal analysis of those issues.
11. There are a number of different legal procedural routes by which a marriage may be entered into. A marriage may be solemnized according to the rites of the Church of England, the form according to which such a marriage is solemnized being contained in the Book of Common Prayer or in other, legally authorised, alternative forms of service.
12. Alternatively, a marriage may be solemnized in a registered building of another religious denomination or in a register office or on ‘approved premises’ such as a hotel. In all of those cases the marriage may be solemnized without using any statutorily prescribed form or ceremony provided that a certain statutory form of words is used at some point in the proceedings. The same forms of words are used to contract a marriage irrespective of whether it takes place in a register office, a hotel or a non-Church of England religious building.<sup>5</sup>
13. Further alternatives are that a marriage may be solemnized in a synagogue according to Jewish usages or solemnized according to the usages of the Society of Friends (‘Quakers’).
14. **Irrespective of the particular form or ceremony according to which a marriage is solemnized, the legal institution into which the parties enter is the same:** the single legal institution of marriage. That this is so is reflected by other legal provisions concerning marriage. The law concerning capacity to marry and impediments to marriage does not differ according to the form by which a marriage is solemnized (see e.g. sections 1 and 2 of the Marriage Act 1949). Leaving aside purely procedural defects which necessarily vary according to the form used, the grounds on which a marriage is void or voidable are the same irrespective of the form by which it was solemnized (see sections 11 and 12 of the Matrimonial Causes Act 1973).
15. The consultation paper fails to acknowledge the essential point that in English law there has, down the centuries, been a single institution of marriage. That institution has not varied according to the form or ceremony by which a marriage has been solemnized. The solution proposed to deal with the concerns of the Church and other religious bodies about redefining marriage – i.e. that persons of the same sex should be able to enter into a marriage using civil forms but not religious forms – completely fails, therefore, to address those concerns.

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<sup>5</sup> Sections 44, 45 or 46B, Marriage Act 1949.

16. Moreover, what is said at paragraph 2.4 – “There is, however, no legal definition of religious and civil marriage. Marriage is defined according to where it can take place, rather than being either specifically religious or civil” – is wrong. The only kind of marriage which English law recognises is one which is essentially the voluntary union for life of one man with one woman to the exclusion of all others.<sup>6</sup> That is the definition of what marriage is. The question of where a marriage is solemnized, or the form or ceremony used, is immaterial to the definition of marriage.
17. It follows that the consultation paper is misleading when it presents the Government’s proposals as not affecting “religious marriage”. What it is in fact proposing is a redefinition of the legal institution of marriage generally. This emerges from what is said in paragraph 2.7.<sup>7</sup> It is unfortunate that the consultation paper obscures that intention by concentrating on purely procedural matters rather than addressing matters of substance.
18. **The effect of the proposals would be that everyone who wished to marry – irrespective of the form or ceremony by which their marriage was solemnized – would be required to enter into the same new, statutory institution of ‘marriage’. That institution would be one which was defined as the voluntary union for life of any two persons.** English law would, as a result, cease to provide or recognise an institution that represented the traditional understanding of marriage as the voluntary union for life of one man with one woman.
19. This represents a fundamental change. The fact that under what is proposed only opposite-sex couples would be able to have a marriage solemnized according to religious forms and ceremonies does not alter that analysis. The legal institution into which an opposite sex-couple who married according to religious forms and ceremonies entered would be the same legal institution into which a same-sex couple would enter according to civil forms and ceremonies.
20. The established institution of marriage, as currently defined and recognised in English law, would in effect, have been abolished and replaced by a new statutory concept which the Church – and many outside the Church – would struggle to recognise as amounting to marriage at all. A man and a woman who wished to enter into the traditional institution of marriage would no longer have the opportunity to do so. Only the new, statutory institution, which defined a ‘marriage’ as the voluntary union of any two persons, would be available.
21. Saying, therefore, as the consultation paper does, that no changes are proposed to marriage according to the rites of the Church of England overlooks the fact that the institution of marriage would have been redefined generally for the purposes of English law. At the very least that raises new and as yet unexplored questions about the implications for the current duties which English law imposes on clergy of the Established Church.
22. A general redefinition of marriage would also have implications for the legislative provisions that are concerned with the Church’s teaching on marriage.

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<sup>6</sup> *Nachimson v Nachimson* [1930] P 217, CA; *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130; *Re Bethell, Bethell v Hildyard* (1888) 38 ChD 220; *Sowa v Sowa* [1961] P 70, [1961] 1 All ER 687, CA.

<sup>7</sup> “Once a couple have got married either through religious or civil means, they will then be treated for legal purposes as being married. We are not proposing to create two separate legal regimes for civil and religious marriages. We are proposing that the law is clear that marriages conducted through a civil ceremony would be open to all couples and marriages conducted through a religious ceremony and on religious premises can only be between a man and a woman.”

23. The Church of England's teaching on marriage is embodied in law. Canon B 30 states: "*The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union, permanent and lifelong, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side....*"<sup>8</sup>
24. The Canons of the Church of England are part of the law of England. The Queen's licence and the Royal Assent are required before a canon may be made and promulgated. Canons are additionally subject to statutory provisions which provide that they do not have effect if they are contrary to the customs, laws or statutes of the realm.<sup>9</sup>
25. Were legislation to be enacted by Parliament that changed the definition of marriage for the purposes of the law of England, the status and effect of the canonical provisions that set out the Church's doctrine of marriage as being between one man and one woman would be called into question. In this way too the consultation overlooks the implications of what is proposed for the position of the established Church.

### **Scope for challenges to what is proposed under the ECHR**

26. If the proposal to redefine marriage were to be implemented, it must be very doubtful whether limiting same-sex couples to non-religious forms and ceremonies could withstand a challenge under the European Convention on Human Rights.
27. Until recently, the European Court of Human Rights (ECtHR) had consistently held that the right to marry provided for in article 12 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) meant the marriage of a man and woman only and did not cover same-sex unions of any kind. But in 2010 the ECtHR, in deciding the case of *Schalk v Austria*<sup>10</sup> took a different line. The applicants in that case, a same-sex couple, raised complaints under a number of articles of the ECHR following the refusal by the Austrian authorities of their application to marry.
28. The ECtHR had regard to article 9 of the Charter of Fundamental Rights of the European Union which recognised "the right to marry" (rather than that "men and women of marriageable age have the right to marry and to found a family" as per article 12 ECHR). It also had regard to the commentary to the EU Charter which said that article 9 of the Charter was "broader in scope than the corresponding articles of other international instruments" by omitting an explicit reference to "men and women", although there was no requirement that domestic laws should facilitate same-sex marriages.
29. The ECtHR held, in the light of that provision of the EU Charter, that it would no longer consider that the right to marry enshrined in article 12 of the ECHR "must in all circumstances be limited to marriage between persons of the opposite sex". Article 12 could not, therefore, be said to be inapplicable to the applicants' complaint. Nevertheless "the question whether or not to allow same-sex marriage" was left open to regulation by domestic law.<sup>11</sup>

<sup>8</sup> Revised Canons Ecclesiastical, Canon B 30, paragraph 1.

<sup>9</sup> Sections 2 and 3, Submission of the Clergy Act 1533; section 1(3), Synodical Government Measure 1969.

<sup>10</sup> Application No. 30141/04.

<sup>11</sup> See paragraph 61 of the judgment: "Regard being had to art 9 of the charter, therefore, the court would no longer consider that the right to marry enshrined in art 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that art 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the contracting state."

30. *Schalk* represents a substantial shift in the jurisprudence of the ECtHR on the right to marry and same-sex unions. The position of the Court now appears to be that while it remains open to a member state not to make provision for same-sex marriage, where provision is made for same-sex marriage article 12 is applicable whether the parties are of the opposite sex or of the same sex.
31. The Court further held that same-sex couples were in a “relevantly similar situation” to opposite-sex couples for the purposes of article 14 of the ECHR (enjoyment of rights to be secured without discrimination on grounds of personal characteristics), again departing from an earlier line of decisions.
32. A number of points arise from this recent development in the jurisprudence of the ECtHR (to which our domestic courts are required to have regard):
  - It remains the case that member states of the Council of Europe are not obliged to make legal provision for same-sex marriage.
  - If a member state chooses to make provision in its domestic law for same-sex marriage, then so far as the ECHR is concerned same-sex marriage is protected by the Convention in the same way that opposite-sex marriage is protected: the right to marry contained in article 12 is applicable to both categories so far as that state is concerned.
  - Same-sex couples are in an analogous position to opposite-sex couples so far as the anti-discrimination provisions of article 14 of the ECHR are concerned.

Applying those principles to the current proposals leads to the following conclusions:

- The Government does not need to legislate in order to meet its convention obligations. The United Kingdom is already compliant, civil-partnerships conferring equivalent legal rights on same-sex couples as marriage does on opposite-sex couples.
  - If the Government chooses to introduce legislation providing for same-sex marriage – and Parliament passes it – article 12 of the ECHR (the right to marry) would be capable of applying both to opposite-sex and to same-sex couples.
  - If opposite-sex couples were able to enter into the (newly-defined) legal institution of marriage in accordance with either religious or civil forms and ceremonies but same-sex couples were able to enter into that institution only in accordance with civil forms and ceremonies that, of itself, would be unlikely to amount to a breach of article 12 because such an arrangement would not deprive same-sex couples of the substance of the right to marry.
  - **But there would be a serious prospect of a successful challenge to that arrangement under article 14 taken in conjunction with article 12, on the basis that same-sex couples were being discriminated against in relation to matter that was within the ambit of article 12.**
33. It is well established that the non-discrimination provisions of article 14 are applicable where the subject matter of the discrimination is within the ambit of one of the other articles of the Convention. If marriage in England and Wales were redefined to include unions between persons of the same-sex then such unions would, following *Schalk*, come within the ambit of article 12. That being so, it would be open to a same-sex couple to bring a claim (initially in the domestic courts – probably for a declaration of incompatibility – and ultimately in the ECtHR) that they had been treated differently

from opposite sex couples in that, unlike the latter, they were unable to have their marriage solemnized following religious forms and ceremonies.

34. Given what the ECtHR has said in *Schalk*, and given that under what is proposed English law would treat same-sex marriages as the same thing as opposite-sex marriages, the same-sex couple would be in an analogous position to a same-sex couple for the purposes of article 14. A court could not say – as the ECtHR has said on occasions in the past – that the difference in treatment was explicable by the complainants being in a materially different position from the comparators.
35. That being so, the difference in treatment could be upheld only if it could be justified: that is that it was judged to be a proportionate means of pursuing a legitimate aim.
36. Providing that same-sex marriages may not be solemnized in accordance with religious forms and ceremonies would probably be held to be pursuing a legitimate aim in that the intention would be to respect the right to freedom of religion: religious bodies should not be required to solemnize marriages contrary to their religious beliefs. But it is very doubtful that a legislative provision which limited same-sex couples to non-religious marriage ceremonies would be held (either by our domestic courts or by ECtHR) to amount to a proportionate means of pursuing that aim.
37. There are religious bodies which have said that they are ready and willing to solemnize same-sex marriages. That being so, a legislative provision which prevented same-sex marriages being solemnized according to any religious forms and ceremonies would be likely to be held to go further than was necessary to meet the legitimate aim of not requiring religious bodies who were opposed to doing so to solemnize same-sex marriages. Moreover, because sexual orientation is one of the ‘suspect categories’ which require very weighty reasons to justify a difference in treatment the Government would bear a very heavy burden in seeking to show that the means was proportionate to the legitimate aim pursued.
38. It is not possible to predict with certainty the outcome of proceedings that sought to challenge such a provision – either in our domestic courts or in Strasbourg. But if Parliament proceeded to legislate for same-sex marriage, it would not be long before the proposed restriction of same-sex marriage to civil forms and ceremonies came under legal challenge; and such legal challenge would have a good prospect of success.
39. It is doubtful therefore that the line taken in the consultation paper – that same-sex marriages would not be able to be solemnized according to any religious forms and ceremonies – would survive legal challenge.
40. The result is that the assurances the Government seeks to give at paragraphs 2.10 and 2.11 of the consultation paper cannot prudently be relied on. Paragraph 2.10 states that because legislation would make it “clear that marriages conducted according to religious rites on religious premises could not be between a same-sex couple” the result would be “that no religious organisation ... would face a successful legal challenge for failing to perform a marriage for a same-sex couple ...”.
41. And paragraph 2.11 states that because “it would not be legally possible for a Church of England minister to marry a same-sex couple on religious premises through a religious ceremony” the result would be that “there would therefore be no duty on Church of England ministers to marry same-sex couples. Their duty would remain unchanged and relate only to opposite-sex couples within the

relevant parish. As a result, no Church of England minister should face a successful legal challenge for refusing to conduct a same-sex religious marriage”.

42. These assurances are all based on the position being as proposed in the consultation paper: i.e. the limitation of same-sex couples to non-religious forms and ceremonies. If, however, that position were not upheld – either because it was held to be unlawful by the courts or as a result of changes to the applicable legislation during its passage through Parliament or by way of subsequent amendment – the basis for those assurances would fall away.
43. In that scenario a considerable amount of further legislative provision would be required in order to protect the position of the Church of England and other religious bodies. In particular the whole range of rights and duties that exist in relation to marriage and the Church of England would have to be re-examined.
44. Even if a mutually acceptable legislative solution could be found by way of limiting such rights and duties, it cannot be assumed that any such solution would itself withstand subsequent challenge, whether in our domestic courts or in Strasbourg. The ultimate outcome for both Church and State would be quite uncertain.

### **Civil partnerships**

45. It is very doubtful whether the proposed continued limitation of civil partnerships to same-sex couples would withstand legal challenge, were the main proposal concerning the redefinition of marriage to be implemented.
46. Article 14 of the ECHR could also have implications for the Government’s proposal that civil partnerships should remain available for same-sex couples but not opposite-sex couples. Civil partnerships are within the ambit of article 8 of the Convention (right to family and private life). An opposite-sex couple who wished to enter a civil partnership (and not to marry) could bring a complaint under article 14 taken in conjunction with article 8 on the grounds that they were treated differently from a same-sex couple who wished to enter a civil partnership (and did not wish to marry).
47. As the law currently stands, the Government would probably be able to justify the difference in treatment on the basis that civil partnerships for same-sex couples only were a social measure designed to confer legal benefits on same-sex couples that they would not otherwise be able to acquire and that they therefore amounted to a proportionate means of pursuing a legitimate aim.
48. But if the law were changed so that same-sex couples were able to marry, the legitimate aim of providing civil partnerships for same-sex couples only would cease to exist. Or at least it would change very substantially, such that, even if the limitation of civil partnerships to same-sex couples pursued a legitimate aim of providing a legal status for same-sex couples who did not wish to marry, the exclusion of opposite-sex couples from civil partnerships would not seem to be proportionate.
49. This is because some opposite-sex couples might equally not wish to marry but nevertheless wish to acquire a legal status in respect of their relationship. There would be no obvious justification that a court would accept for such a difference in treatment.
50. There is therefore a real question as to whether the line taken in the consultation paper that civil partnerships would remain limited to same-sex couples would withstand legal challenge.